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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to Review a Judgment Reversing a Judgment of a District Court for the Northern District of California.

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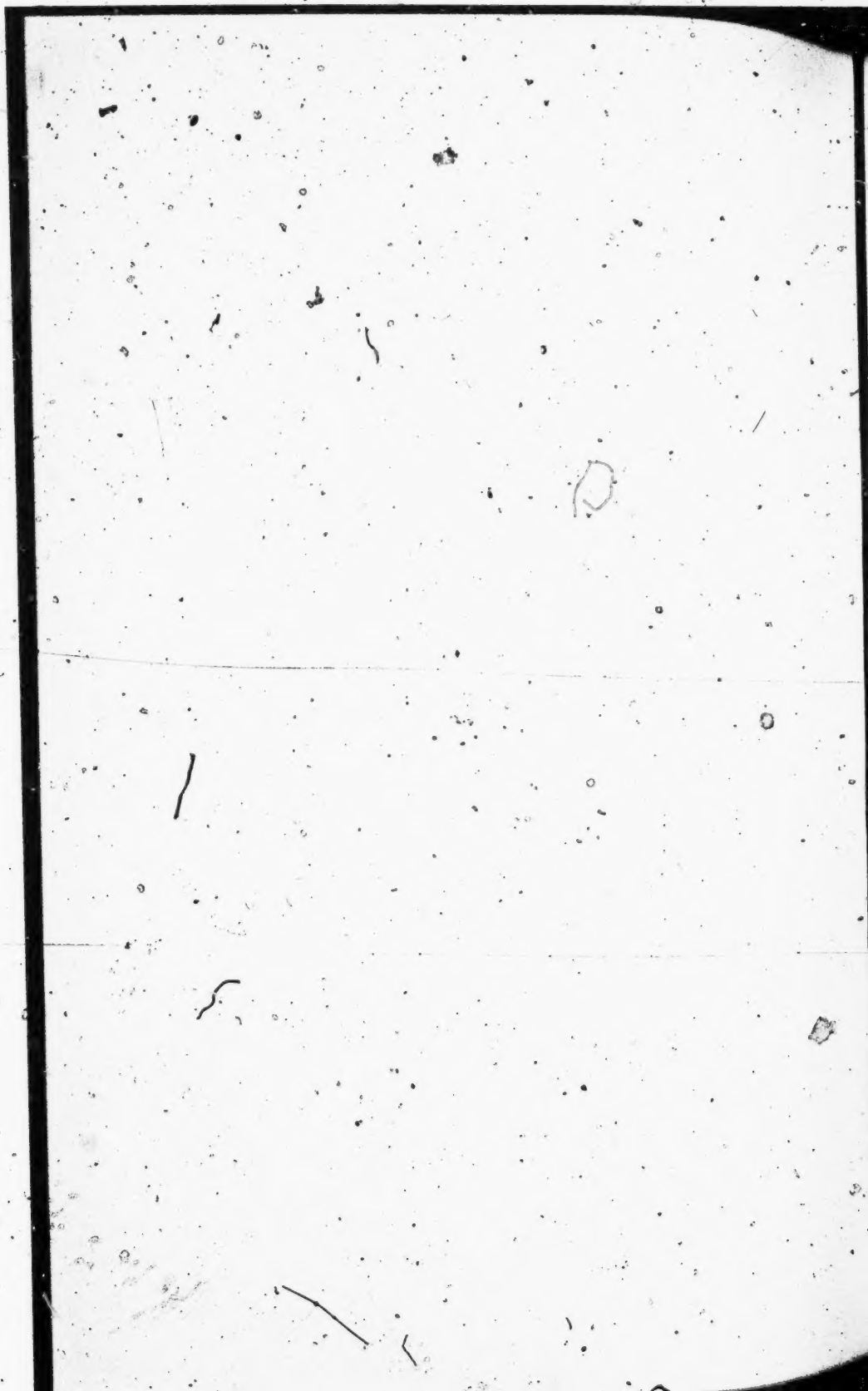


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BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to Review a Judgment Reversing a Judgment of a District Court for the Northern District of California.

This case is before this Honorable Court on writ of certiorari to the United States Circuit Court of Appeals of the Ninth Circuit, to review a judgment of that Court reversing a judgment of a District Court for the Northern District of California, which granted an injunction prohibiting respondent from construct-

ing an extension of its line of railroad in San Mateo County, California, without first procuring from the Interstate Commerce Commission a certificate of public convenience and necessity therefor, as required by Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Pars. (18), and (20)).

OPINIONS OF COURTS BELOW.

The official report of the opinion delivered in the Circuit Court of Appeals is to be found in the Transcript of Record herein, presented with the petition for a writ of certiorari, at pages 316 to 322, inclusive. A copy thereof is appended to the supporting brief presented with the petition for the writ of certiorari herein, and the opinion is published in the advance sheets of volume 46 F. (2d), pages 729 to 731, inclusive.

There was no opinion delivered in the District Court in the final disposition of this case, but the report of the Special Master, including his findings of fact and conclusions, are to be found in the Transcript of Record herein, pages 35 to 45, and the final decree of the District Court granting the injunction prayed for is to be found in said Transcript of Record, pages 61 to 75.

In the District Court a memorandum opinion was filed by the trial judge in granting a temporary injunction herein, which is contained in the record (R. 32-35).

JURISDICTION.

This case involves the interpretation and application of Paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Section 1, Pars. (18), (19), (20) and (22)), contained in the Transportation Act of 1920. The jurisdiction of this Court herein is conferred by Judicial Code, Section 240, Sub. (a) (28 U. S. C. A., Section 347, Sub. (a)).

These statutes are set out in the appendix to this brief.

The judgment or decree of the Circuit Court of Appeals to be reviewed herein was given and made February 9, 1931 (R. 323). The order of said Court denying petitioner's petition for a rehearing therein was made March 16, 1931 (R. 323, 324). Petitioner's petition to this Court for a writ of certiorari was filed in this Court April 20, 1931, and the order of this Court granting said petition was made May 25, 1931.

The judgment or decree of the District Court was given and made on February 28, 1930, and is to be found in the Transcript of Record at pages 61 to 75. Defendant (respondent here) appealed from said judgment or decree to the Circuit Court of Appeals of the Ninth Circuit, May 26, 1930 (R. 292, 293).

The action here involved was commenced in the District Court of the United States for the Southern Division of the Northern District of California, by your petitioner as a party in interest under the provisions of said Paragraph (20), to enjoin the construction by respondent, a common carrier in interstate and

intrastate commerce, of an extension of its line of railroad in San Mateo County, California, without first having secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing such construction, as required by said Paragraphs (18) and (20).

In the District Court issue was joined upon the question whether the proposed construction by defendant (respondent here), would constitute an extension of its line of railroad within the meaning of that term as used in said Paragraph (18), and upon the question whether plaintiff (petitioner here) was a party in interest within the meaning of that term as used in said Paragraph (20), and so entitled to institute this injunction proceeding.

By consent of the parties the cause was referred to William H. Hunt, Esq., as Special Master, "to take the testimony and report the findings of fact and conclusions of law" to the Court (R. 31, 32).

A full hearing was had before the Special Master, who by consent of the parties also personally examined the territory involved (R. 287). His report, including his findings of fact and conclusions of law in favor of petitioner upon both said issues, was filed in the District Court December 28, 1929 (R. 35-45, incl.). Exceptions to the report were filed by the defendant (respondent here).

On January 31, 1930, the District Court, Judge Frank H. Kerrigan presiding, confirmed the report, adopting the Special Master's findings of fact and conclusions of law as those of the Court (R. 58).

On February 28, 1930, final decree was entered perpetually enjoining defendant from constructing as proposed "unless and until there has first been obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience or necessity requires or will require the construction of such extension" (R. 61-75, incl.).

On appeal by defendant from this decree, the Circuit Court of Appeals, on February 9, 1931, reversed the decree of the District Court solely upon the ground that the plaintiff (petitioner here), was not at the commencement of the action or at any time thereafter, up to the entry of the final decree, a "party in interest" within the meaning of that term as used in said Paragraph (20) (Opinion, R. 316 to 322). The Circuit Court of Appeals declined to decide the question "whether the line contemplated by the appellant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission" (Opinion, R. 316, 322).

CLAIM OF PETITIONER.

It is the claim of petitioner that the Circuit Court of Appeals erred in holding that petitioner was not, at the time of instituting this action and thenceforth to entry of final decree herein, a "party in interest" within the meaning of said Paragraph (20), and as

such fully entitled to maintain the action, under the express authorization conferred by said Paragraph (20) on "any party in interest"; and its reversal of the judgment of the District Court on that ground is expressly assigned as error requiring reversal of the judgment of the Circuit Court of Appeals.

It is further claimed by petitioner that the judgment of the District Court upon the issue whether the proposed construction by respondent would constitute an "extension" of its line of railroad within the meaning of that term as used in said Paragraph (20) finds full support in the findings and conclusions of the Special Master, confirmed and approved by the District Court, and that said findings and conclusions find full and sufficient support in the evidence, and that the Circuit Court of Appeals erred in not so holding, and in not affirming said judgment *in toto*, and its failure so to do is expressly assigned as error.

ARGUMENT.

I.

PETITIONER, AT THE TIME OF THE INSTITUTION OF THIS ACTION AND AT ALL TIMES SUBSEQUENT THERETO, WAS A "PARTY IN INTEREST" WITHIN THE MEANING OF PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT, AND AS SUCH WAS ENTITLED TO MAINTAIN THIS ACTION.

1. Statement of Facts Material to Petitioner's Claim that it is a "Party in Interest".

The facts material to petitioner's claim that it was at the date of the institution of this action and thenceforth to the entry of final decree herein a "party in interest" within the meaning of that term as used in

said Paragraph (20) are uncontroverted, and are as follows:

Petitioner, a subsidiary of The Western Pacific Railroad Company, was incorporated under the laws of the State of California for the purpose, among others, of constructing and operating a line of railroad extending from San Francisco, California, southerly to Redwood City in San Mateo County, California, and thence to a connection with the railroad of The Western Pacific Railroad Company at or near Niles, Alameda County, California (Plff. Ex. 17, R. 277).

On July 16, 1928, it filed with the Interstate Commerce Commission its application for the necessary certificate of public convenience and necessity for the first unit of said proposed line, viz., that portion between San Francisco and Redwood City (R. 85).

Respondent Southern Pacific Company, an interstate common carrier by railroad, the route of whose existing double track main line of railroad between San Francisco and Los Angeles, California (R. 197, 198), was westerly of and nearly parallel with the proposed route of petitioner between South San Francisco and Redwood City, and in the vicinity of and at the point of respondent's own proposed construction approximately 3700 feet westerly from petitioner's route (R. 38), intervened as a "party in interest" in the Interstate Commerce Commission proceeding of petitioner, in opposition to petitioner's application (R. 39).

Hearing on the application was had in San Francisco in January, 1929, and respondent participated

therein. An examiner's report recommending denial of the application was thereafter made, but upon application of petitioner the proceeding was reopened over the objection of respondent (R. 286), and an amended application to construct the whole line from San Francisco to Niles (in no way altering or otherwise affecting the original location of the route of the proposed line in San Mateo County) was filed. At the date of the institution of petitioner's action and at all times thereafter to the entry of the final decree, petitioner's proceeding before the Commission was pending undetermined (Opinion, Circuit Court of Appeals). To avoid any suggestion that this action may have become moot by reason of unfavorable action of the Commission subsequent to the final injunction decree herein, we assume to state, as is intimated by the opinion of the Circuit Court of Appeals, that petitioner's proceeding before the Commission was finally determined by the granting of petitioner's application, prior to decision in this proceeding by the Circuit Court of Appeals.

The territory involved in this proceeding which is proposed to be served by petitioner, being principally the territory lying easterly of its proposed line and bordering on the Bay of San Francisco (R. 38, 39), is in large part available for industrial use and is desirable for industrial projects, and, according to the findings, "is new territory, which has not heretofore been served by the defendant railroad" (respondent here) (R. 39).

Very shortly after the San Francisco hearing on petitioner's application to the Commission, viz., on

March 23, 1929, respondent, without having presented to the Commission any application for the necessary certificate of public convenience and necessity therefor, and under the circumstances and in the manner stated in findings 10, 11 and 12 (R. 40, 41), commenced the construction of an extension to cross petitioner's proposed line, and to be approximately 8200 feet in length, and designed "to serve an unlimited territory extending to the bay of San Francisco" (Finding 11, R. 40), being the same territory proposed to be served by petitioner.

The purpose of respondent (as found by the Special Master) was and is to connect its partially constructed track at its westerly end with its existing line, and to extend it at the easterly end, northerly and southerly and approximately parallel with the proposed railroad of petitioner (R. 42).

Admittedly, respondent has never asked for or obtained any certificate of public convenience and necessity from the Interstate Commerce Commission for the construction or operation of its proposed extension.

Petitioner contended before the Circuit Court of Appeals, and here contends, that upon these facts it manifestly had, at the date of the commencement of the injunction action and thenceforth to the date of entry of the final decree therein, an ever present interest in maintaining the *status quo* as against any railroad construction by another railroad carrier in violation of Paragraphs (18) and (20), into territory which it proposed to serve by a railroad it proposed to construct, and application for certificate to con-

struct which by it was pending undetermined with the Interstate Commerce Commission, sufficient to make it a "party in interest" within the meaning of said Paragraph (20).

2. Meaning of Term "Any Party in Interest" as Used in Said Paragraph (20).

(a) The Circuit Court of Appeals Herein Erred in Adopting Meaning of Term "Any Party in Interest" Contended for by Respondent.

Paragraph (20) (set forth in Appendix) contains the following provision:

> "*Any construction,* operation, or abandonment *contrary to the provisions of this paragraph* or of paragraph (18) or (19) of this section *may be enjoined* by any court of competent jurisdiction *at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest;* * * *" (emphasis ours).

What is necessary to constitute one a "party in interest" within the meaning of this paragraph?

In answering this question the learned Circuit Court of Appeals adopted the contention of counsel for respondent to the effect that since Paragraph (20) does not define "party in interest," such a party "must possess those qualifications requisite to enable a party to maintain a suit in equity for an injunction" (p. 4 of Respondent's Reply Brief to Petitioner's Brief on Application to this Court for Writ of Certiorari), and, applying the well settled rules applicable in the ordinary injunction suit brought by a plaintiff in his own right to protect against threatened irreparable injury, held that one could not be a "party

in interest" within the meaning of the paragraph unless he was possessed of some existing *independent legal right of his own*, the invasion of which is threatened by the act sought to be enjoined.

In our brief in support of our petition for certiorari herein, we set forth at length our reasons (pages 18 to 33) for our claim that this theory of the Circuit Court of Appeals is erroneous and that the qualifications essential to a plaintiff maintaining an action in his own right to protect himself from threatened irreparable injury, under the well settled principles applicable in the ordinary injunction action, are utterly inapplicable to the plaintiff in the statutory injunction action afforded by said Paragraph (20) to "any party in interest" to enjoin construction of a railroad extension by a railroad carrier which has not procured the necessary certificate of public convenience and necessity therefor from the Interstate Commerce Commission, as required by said Paragraphs (18) and (20). In view of this showing in such brief, we shall here discuss that matter as briefly as we can, referring only to the reasons why such a construction of the term "any party in interest" is manifestly opposed to the whole purpose of the statute involved.

Whether one is a "party in interest" within the meaning of said Paragraph (20) must necessarily depend upon whether he is a "party in interest" *with relation to the extension proposed to be enjoined*, construing Paragraph (20) in connection with Paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act in the light of the legislative

purpose in authorizing injunction to prevent violation of said provisions.

In discussing the meaning of the terms "extension" and "industrial track" as used in these sections, this Court said in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Railway Co.* (hereinafter referred to as the *Texas & Pacific* case), 270 U. S. 266, 70 L. ed. 578, at page 583:

> "A truer guide to the meaning of the terms extension and industrial track, as used in Paragraphs (18) to (22) is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920."

This Court then proceeded to state such policy. (See page 20, Petitioner's Brief in Support of Petition for Writ of Certiorari). The same is obviously true of the term "any party in interest" in Paragraph (20).

In pursuance of this policy, Paragraphs (18) and (20) contain an absolute prohibition of any extension unless and until authorization of the Interstate Commerce Commission shall first have been obtained therefor, evidenced by a certificate of public convenience and necessity.

Paragraph (20) has also to do with the matter of enforcing compliance by railroad carriers with the provisions of Paragraph (18) and the permission in Paragraph (20) "From and after issuance of such certificate, and not before, the carrier by railroad may, * * * proceed with the construction * * * covered thereby."

(b) The Injunction Provided by Paragraph (20) is Effective Solely to Prohibit Construction Contrary to Statutory Prohibition, and Does Not Protect or Purport to Protect Any Legal Right of a Plaintiff.

The injunction provided thereby is effective only to prohibit construction contrary to the provisions of these statutes, and does not purport to protect any legal right of the party plaintiff, whether that plaintiff be the United States, a governmental commission or board, or a "party in interest", all of whom are placed in the same category with regard to the right to maintain such a suit. Whatever benefit a "party in interest" plaintiff may obtain thereunder is solely such benefit as will incidentally result from the defendant *being prevented by injunction from violating these statutory provisions,* and the primary purpose of the injunction provision was to enforce compliance by carriers with such provision, by prohibiting the same "unless and until there has first been obtained from the Interstate Commerce Commission" the necessary certificate of public convenience and necessity therefor (R. 75).

(c) The Legislative Act in Conferring Upon Any "Party in Interest" the Right to Institute Injunction Action to Prevent Prohibited Construction, Would be Pure Surplusage Under the Meaning Attributed to Such Term by the Circuit Court of Appeals Herein and Respondent.

To give the term "any party in interest" the meaning attributed to it by the Circuit Court of Appeals and learned counsel for respondent herein, viz., that it includes only those who have some independent legal right of their own, which is threatened to their irreparable injury by the proposed extension, would make it pure surplusage.

Illustration of this is to be found in *Baltimore & Ohio R. R. Co. et al. v. United States,* 264 U. S. 258, 68 L. ed. 667, familiarly known as the "*Chicago Junction* case"; *there was no statutory authorization available to the plaintiffs therein for the maintenance of their action* to vacate and set aside an order of the Interstate Commerce Commission, but the plaintiffs were nevertheless held entitled to maintain their action for the reason, as expressly stated by the Court in its subsequent decision in *Alexander Sprunt & Son, Inc. v. United States,* 281 U. S. 249, 74 L. Ed. 832, 838, "that an independent legal right of the plaintiff was affected by the order which it was sought to set aside."

A party having an independent legal right of his own may protect it by injunction where necessary, *without any statutory authorization.*

In the instant case we are dealing with a statute which expressly confers the right to maintain this action upon "any party in interest". As to parties having independent legal rights of their own, such conferring of statutory authority would be wholly unnecessary and pure surplusage, for they could maintain their action regardless thereof. It must be presumed that Congress, in inserting this provision for an injunction suit by "any party in interest", had in mind other parties than those already afforded full protection of their legal rights by substantive law.

(d) No Party Has an Independent Legal Right of its Own With Reference to the Threatened Loss of a Competitive Advantage.

Threatened loss of a competitive advantage is not, as to the party threatened with loss, a legal actionable

loss, and *such party has no independent legal right of its own with reference thereto,* and therefore, under the construction of the term "any party in interest" given by the Circuit Court of Appeals herein, could not, as an interested party, maintain the statutory action authorized by Paragraph (20).

We take it that it will not be questioned that loss of traffic by a railroad carrier due to mere competition is not such an injury to such carrier as is violative of any of such carrier's independent legal rights. This was fully recognized in the *Chicago Junction* case, and we are of opinion that this view has never been seriously questioned.

In the case of *Alexander Sprunt & Son, Inc. v. United States, supra,* it was expressly held that one possessing simply a competitive advantage had no such right as entitled it to maintain an independent suit to set aside an order of the Interstate Commerce Commission, this Court saying (74 L. ed. 837):

> "The enjoyment of this advantage *gave them a distinct interest in the proceeding before the Commission* * * *. *For their competitive advantage was threatened* * * *. But that interest alone did not give them the right to maintain an independent suit to vacate and set aside the order. Such a suit can be brought by a shipper *only where a right of his own* is alleged to have been violated by the order" (emphasis ours).

(NOTE: *It should be noted here that in that case there was no statutory authorization for such a suit by any party in interest.*)

In the *Texas & Pacific* case, *supra,* the only injury threatened was *loss of a competitive advantage. No independent legal right of the Texas & Pacific was involved.* It was recognized throughout that proceeding, instituted under Paragraph (20) to obtain an injunction prohibiting construction of an extension by a rival carrier without the certificate required by Paragraphs (18) and (20), *that it was a "party in interest" with relation to the proposed extension.* This Court, replying to an objection that plaintiff should first have sought relief at the hands of the Interstate Commerce Commission, said:

> "But a *party in interest* who is opposed to the construction is not authorized by the act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear therein in opposition. *If no such application has been made Paragraph (20) affords him the only remedy. That remedy is both affirmative and complete"* (70 L. ed. at page 582) (emphasis ours).

It is to be noted that this Court was here speaking of a carrier as to which the only loss threatened was *deprival of a competitive advantage,* and which was *possessed of no independent legal right of its own.*

The construction herein by the Circuit Court of Appeals of the term "any party in interest" would have prevented not only the Texas & Pacific Railway Company from maintaining its action, but also every other railroad carrier whose only basis of complaint is that the proposed construction threatens competition *based on no requirement of public convenience*

and necessity which would be injurious to it and result in harm to the public. One cannot read the statement of this Court in the *Texas & Pacific* case, *supra* (70 L. ed. at page 584), set forth on page 20 of our brief in support of our petition for writ of certiorari, without realizing that railroad carriers threatened with competition by the proposed construction of another railroad carrier constituted a class which in the opinion of Congress required protection against unauthorized construction, and that the Congressional intent in using the term "any party in interest" was in part to afford to such a carrier what this Court, as noted above, said was its "only remedy" against construction undertaken without a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

The Texas & Pacific Railway Company could *not* have maintained its injunction action under the views expressed by the Circuit Court of Appeals in this case. It seems clear that this Court considered it a "party in interest" within the meaning of the statute.

(c) The Legislation in Question Utterly Fails to Support an Interpretation of the Term "Party in Interest" as Including Only Parties Having Independent Legal Rights of Their Own to Protect, Capable of Being Enforced in Equity, but the Legislation Connotes the Contrary.

There is absolutely nothing in this legislation upon which to reasonably base a conclusion that the term "party in interest" as used therein was intended to include only those having independent legal rights of their own capable of being enforced in equity. As used here, the term really connotes the contrary.

Under the terms of this statute, the proceeding authorized is absolutely devoid of the issues incident to actions in equity, and does not afford the relief to be obtained in such an action; aside from an issue as to whether the plaintiff is a "party in interest" within the meaning of the statute, but one issue is material in such a proceeding, viz., is the defendant proceeding to construct an extension of its railroad without having first procured the required certificate of public convenience and necessity from the Interstate Commerce Commission. If the answer be "yes", the decree enjoining such construction pending the obtaining of such certificate must follow. The sum total of the relief granted by the statutory decree is the enjoining of construction *expressly prohibited by law.* Whatever this statutory action under Paragraph (20) may be styled, as to being in equity or otherwise, it is obvious that, in fact, it possesses none of the characteristics of an action in equity in either issues or relief to be obtained, with the single exception that the relief is to be in the form of the limited injunction prescribed as above stated, one granted solely to prevent violation of an express statutory prohibition enacted by Congress.

(f) The Term "Any Party in Interest" as Used in an Analogous Statute Has Already Been Defined by this Court Contrary to the Opinion of the Circuit Court of Appeals Herein and Respondent's Contention, Which Definition and Construction are Applicable to and Controlling Upon the Meaning of Said Term in Paragraph (20).

This Court has already defined the term "any party in interest" as used in an analogous statute (Sec. 212 Judicial Code, now Secs. 44 and 45 (a) of Title 28,

U. S. C. A. Supp. 1929 thereto) in *Alexander Sprunt & Son, Inc. et al. v. United States, supra* (see page 15, *supra*).

In that case parties whose *only basis of complaint was that their competitive advantage was threatened* by an order of the Commission were attempting to maintain an action to annul the order, and were held, in the language quoted on page 15, *supra,* to have a *distinct interest* in the proceeding before the Interstate Commerce Commission, for the sole reason that *"their competitive advantage* was threatened", and were entitled under said Sec. 212 Judicial Code, as *"parties in interest"* to *intervene* as of right in any suit wherein is involved the validity of the order of the Commission.

It is plain from what was said by the Court in that case that if the statute had authorized the *maintenance* of an independent suit by any such "party in interest", *as Paragraph (20) here does authorize,* this Court would necessarily have held that these shippers, as such shippers, were entitled to institute and maintain the action there under consideration. It did expressly hold that the shippers therein, who had no independent legal right of their own, were "parties in interest" within the meaning of that term as used in said Sec. 212 of the Judicial Code, and entitled to all the remedies afforded by that section to "parties in interest".

We do not understand that learned counsel for respondent contend that Congress had not the *power* to confer the authority to maintain in a Federal Court the suit specified in Paragraph (20) upon a party

having no independent legal right of its own, although their detached quotation from *Cates v. Allen,* 37 L. ed. 804, 149 U. S. 451, 458, on page 4 of their reply brief herein, *might* so imply. The syllabus of that decision, 37 L. ed. 804, correctly sets forth the principle declared, as follows:

> "Equitable relief in aid of demands cognizable in the courts of the United States only on their law side cannot be sought in the same action, although allowable in the state courts by virtue of state legislation."

The Court was here considering a *state* statute purporting to give a right to an enforceable lien on property on facts not sufficient to create such or any lien under the federal practice, and a divided Court held this right, valid enough in the state courts, could not be enforced in a *federal* Court. The quotation of counsel for respondent certainly does not go to the extent of declaring a principle to the effect that Congress *could not* empower federal Courts to entertain an action by a party situate as is petitioner here, for the relief prescribed by Paragraph (20) of Section 1 of the Interstate Commerce Act, and one would be at a loss to find any rule of law sustaining such a declaration.

Nor is there any authority cited by respondent to sustain its proposition that because Paragraph (20) does not itself expressly define the term "any party in interest", such a person must be one who possesses the qualifications requisite to enable a party to maintain the ordinary suit in equity for an injunction.

With the exception of actions to *annul or vacate orders of the Interstate Commerce Commission, as to all of which there was no statutory authorization for the maintenance of an independent action by a party in interest,* the other cases relied on by respondent are simply the ordinary actions in equity for an injunction.

3. Upon the Material Facts, Petitioner Was at the Time of the Commencement of this Action and Thenceforth to Final Decree, a "Party in Interest" Within the Meaning of Said Paragraph (20).

If we divorce ourselves from the idea that the term "any party in interest" as used in said Paragraph (20) denotes solely a party having some independent legal right of its own which is being invaded, as we submit we must do in view of the considerations to which we have referred, it seems clear that the facts herein are such as to establish very clearly that petitioner comes within that term.

The words "any party in interest" are words of broad scope and taken simply as they read would clearly include anyone who has any "interest" having relation to the threatened action sought to be enjoined. There is nothing in the connection in which they are here used to limit such meaning. In fact, considering the purpose of the enactment of these provisions of law (said Paragraphs (18), (19) and (20)) such meaning is emphasized rather than limited. Congress was obviously seeking assurance of the enforcement of the prohibitions contained therein. These considerations compel a construction of the term which would include all who, by reason of their then situa-

tion, *have a real and legitimate concern in the threatened violation of law, and may be disadvantaged by such violation.* It is to be noted that the statute does not attempt *to measure the extent, amount or character of the interest required* in a plaintiff. It is enough that the party has an "interest" having relation to the threatened extension sought to be enjoined. If any limitation of any character had been intended it would have been inserted, as was done in Section 16 of the Clayton Act with relation to injunctive relief against threatened loss or damage by a violation of the Anti-trust laws, the right to sue for and have injunctive relief being declared to exist "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings".

We have herein at pages 6 to 10, inclusive, set forth the material facts in this respect.

The picture presented thereby is substantially as follows:

Seeking to enter new territory not in fact served by any railroad carrier, petitioner proceeds in a lawful manner to make application to acquire the necessary authorization from the Interstate Commerce Commission. Opposed by respondent, the contest is a protracted one. While such contest is pending, respondent, still opposing petitioner's application and without filing any application for a certificate authorizing extension of its own railroad into such territory, proceeds to actually construct an extension of its own railroad into such territory. Manifestly the

presence of another railroad in such territory will be of great disadvantage to petitioner in the matter of traffic, if it constructs its own railroad therein. Manifestly, too, if respondent had applied to the Interstate Commerce Commission for the necessary certificate, petitioner, because of its own pending application, *would have been entitled to intervene in respondent's proceeding as a "party in interest" therein,* and in the two pending proceedings (petitioner's and respondent's) it would have been determined by the Commission what "the present or future public convenience and necessity" required in the matter of railroad construction in that territory, i. e., whether one or the other or both of these carriers should construct their respective lines of railroad into such territory. *There is no way by which that question can be determined by the Commission except upon an application by respondent for the necessary certificate* (*Texas & Pacific* case, *supra*), and respondent here failed to make any such application and has proceeded with actual construction in violation of the statute expressly prohibiting such action, thus attempting to avoid determination of the question whether its extension is, under the circumstances, warranted by considerations of public convenience and necessity, a matter in which petitioner is, *by reason of its own pending application,* vitally concerned.

Does it not seem clear that, in such a situation, petitioner had a present "interest" in maintaining the status quo as against any unlawful extension by another carrier into its proposed territory, pending determination of its own application with regard thereto,

and that it was therefore, at the commencement of its suit, and thenceforth to final decree, a "party in interest" with relation to such proposed extension, within the meaning of said Paragraph (20). It is obvious that, without this injunctive remedy, petitioner would have found upon the granting of its application, that the territory to be traversed by its own line was already occupied by an extension of the railroad of its principal competitor for business, very materially altering the situation existing at the commencement of its own proceeding for the necessary certificate of public convenience and necessity.

The fact that at the time of the initiation of this suit and thenceforth to the time of final decree in the District Court, it was possible that petitioner's application for a certificate of public convenience and necessity might be finally denied, cannot detract from petitioner's interest. By duly making its application to the appropriate lawful tribunal for a certificate it put itself into a position under the law where it had the right to oppose, by all lawful means, the unlawful entry of another carrier into the territory proposed to be served by it. That it could, *as a party in interest, intervene in opposition in any proceeding before the Commission initiated by another carrier for authorization to extend its line into such territory, cannot be doubted.* Having such right of intervention and being denied the exercise thereof by the failure of respondent to seek a certificate from the Commission, petitioner assuredly had such an interest in fact with relation to an extension of respondent's line into the same territory as to warrant its being classed as a

"party in interest" with regard thereto, and possessed full capacity as such under said Paragraph (20) to institute and maintain this action, brought solely to enjoin construction by respondent of an *unlawful extension* to serve the same territory. The effect of such an injunction would necessarily be to require respondent, as a condition precedent to construction of its proposed extension, to apply to the Commission for the necessary certificate of public convenience and necessity, thus insuring an opportunity to the Commission to determine whether the proposed extension of respondent was required by public convenience and necessity.

For purposes of argument, considering the question here presented as one never heretofore decided by this Court, we respectfully submit that our claim finds full support in the admitted facts. However, we submit that in the light afforded by the opinions of this Court in the *Texas & Pacific* case, *supra,* and *Sprunt & Son, et al. v. United States, supra,* it is established beyond reasonable question.

Respondent attempts (pp. 13 and 14, Resp. Br. opposing Petition for Certiorari) to distinguish the *Texas & Pacific* case from this case. No material distinction is shown. That the Texas & Pacific was actually serving the territory invaded and was enjoying a lucrative business therefrom of course made it a party in interest, but, as we have seen, it had no legal right to a continuance of this traffic, or to "that business", and in the absence of such a statutory right as we have here in Paragraph (20) would have been absolutely without any remedy whatever, as this Court expressly

held. Respondent's own citations as to the qualifications essential to a plaintiff seeking injunction in the ordinary equitable action, where no statutory authority exists, demonstrate this. Petitioner here, by virtue of its pending application to serve this very territory, had a real present *interest in maintaining the status quo therein as against an attempted extension of respondent's line into this territory* "without compliance with the Act of Congress, but in violation thereof" (Resp. Br. 13), and by virtue of Paragraph (20) "was entitled to an injunction" enjoining respondent from this violation. In such a suit there is no burden on the plaintiff to show affirmatively that it will, in fact, be actually injured by the violation of law complained of. If the proposed construction would be a forbidden extension, the injunction must issue. In the *Texas & Pacific* case, *supra,* this Court said (70 L. ed. at page 582):

> "The prohibition of paragraph (18) is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction."

What is said by respondents about the *Sprunt* case, *supra,* and *Pennsylvania Railroad* case (*Pennsylvania R. Co. v. United States,* 40 F. (2d) 921) (pp. 14 to 16, Resp. Br.), obviously requires no further comment here.

We have never claimed that petitioner ever had any existing *legal right* invaded or threatened, or any right to maintain this action except such as is conferred by Paragraph (20). Neither did the Texas &

Pacific have any such right. But petitioner, at the time of the institution of this suit and thenceforth *had an actual existing present interest in maintaining the status quo in that territory, as against any proposed extension of a rival's line of railroad into the same territory in violation of this law, sufficient to make it a "party in interest" with relation to such proposed construction.*

II.

RESPONDENT'S PROPOSED CONSTRUCTION WOULD CONSTITUTE AN "EXTENSION" OF ITS LINE OF RAILROAD, WITHIN THE MEANING OF THAT TERM AS USED IN SAID PARAGRAPH (20).

1. Statement of Facts Material on Question Whether Construction Would be an "Extension" of Respondent's Line Within the Meaning of Paragraphs (18) and (20).

The proposed line of respondent to be immediately constructed would be approximately 8200 feet in length, and would extend from its existing line in a general easterly direction, to and across a main state highway known as the Bay Shore Highway, and to and across petitioner's proposed line, and thence almost to the waters of the Bay of San Francisco. The estimated net cost to respondent of this construction is $73,160 (R. 102), plus one-half the cost of a grade separation at the Bay Shore Highway, estimated at between $75,000 and $115,000 (Finding 17, R. 43).

In this connection it is to be noted that the final or revised authority for expenditure for this work, dated August 6, 1928, approved September 13, 1928, states "GMO-68280 (revised) did not provide for extending

the track across the entire Rose estate. It is now proposed to construct 1960 feet of track parallel to its main line track and 8200 feet of track extending therefrom toward the bay to serve the property for its entire width". The map accompanying the authority for expenditure shows the proposed trackage extending across the Rose property *to the Bay* (R. 101, 102, and Plff.'s Ex. 5); and also the map attached to the verified answer herein shows the proposed extension as running to the easterly edge of the Rose property on San Francisco Bay.

Lying between the Bay Shore Highway and the Bay, from South San Francisco on the north to Redwood City on the south, is a large area (approximately 23,000 acres) much of which is or can be made available for industrial occupation. None of this territory has ever been served by respondent's railroad (Finding 7, R. 38, 39). One of the objects of petitioner's proposed railroad was to give railroad facilities to such territory as it may be developed and occupied by industries and settlements, the purpose being to afford such facilities to assist in and bring about occupation and development of such territory by industries and settlements which will require railroad service (Finding 18, R. 43).

The area above referred to is unoccupied and undeveloped, there being no industry or settlement which requires railroad service at this time, or in the immediate future (Finding 16, R. 42).

The Rose property, to which respondent claimed in the lower Court that its immediate construction would be confined, consists of approximately 500 acres within

the corporate limits of the City of San Mateo, adjoining at the end west of the Bay Shore Highway the right of way of respondent's main line right of way, and on its easterly end the waters of the Bay of San Francisco. This property is a part of the area here involved, and has never been served by respondent's railroad, and is unoccupied and undeveloped, and without any industry or settlement requiring railroad service (Testimony General Manager Respondent, R. 106). Respondent has urged heretofore, in support of its claim, that the Rose property is not new territory never before served by it, its sole basis for so contending being that said Rose property at its westerly end adjoins respondent's main line right of way and is situate within the corporate limits of the City of San Mateo,—matters that we claim to be absolutely immaterial here. There is no industry located on any part of this property, either east or west of the Bay Shore Highway.

Petitioner's proposed line traverses this tract from north to south.

In so far as the Rose tract trackage is concerned, the proposed construction is not only alleged in the complaint but also expressly admitted in the answer (R. 18). The answer expressly admits that its proposed track "will not be extended for the purpose of serving any existing industry or settlement, but denies that said track will not be extended to serve any existing demand for railroad service, and *admits* that the territory lying easterly of the plaintiff's proposed railroad and between it and the Bay of San Francisco and extending from said City of South San

Francisco to Redwood City is almost entirely unoccupied and undeveloped and has at present no industry or settlement or anything requiring railroad service now or in the immediate future", but avers in substance that the area to be served by respondent does need railroad facilities in the sense that *the same are desirable for the purpose of assisting in and bringing about the occupation and development of such area for industrial purposes* (R. 19, 20). In the lower Court it was shown that the purpose of respondent with regard to the Rose tract construction was, *not* to serve the owners of that tract, for no service was required or possible, *but,* by the presence of its trackage, to make the tract more attractive to producing industries, to which, if induced to locate thereon, it would furnish railroad carrier service, respondent believing such property to be good potential industrial property. As the general manager of respondent put it "We are willing to lay that (the trackage) down even before the first industry is in sight when, in our judgment, the area under construction is a good potential industrial property" (R. 111).

The Special Master found in effect that the purpose and intent of respondent was to extend its railroad by means of this trackage into this territory, viz., the territory hereinbefore described as lying between plaintiff's proposed railroad as located, and San Francisco Bay, in advance of the plaintiff's railroad (Finding 19, R. 43). He further found that it was its purpose "to extend the said railroad at the easterly end northerly and southerly, and approximately parallel with the railroad of the plaintiff" (Finding 15, R. 42).

These findings have sufficient support in the evidence. There has been no claim made by respondent that its proposed trackage would not be used for service anywhere in the territory involved in this suit by means of extensions therefrom north or south or in any other direction. *That it could be so used is obvious.* The general manager of respondent was entirely frank in his testimony as to the use to which the trackage to be immediately constructed was to be put. He testified that if the trackage were constructed as authorized across the Toll Bridge Highway to the Bay, they could thereby serve industries on the Rose property lying northerly of the road (R. 116). He also said:

> "There is nothing sacred about industries on the Rose property. * * * If industries instead of being on the north end of the track are to the south of it, we would still serve them over the track in question if they are closely adjacent thereto.
>
> We do not propose to cross the Bay Shore Highway with frequency as far as industrial tracks are concerned. * * * That would depend a good deal on conditions. *We would make an endeavor not to cross that highway from our main tracks or the proposed road of the plaintiff here any more frequently than we could avoid. That would lead us to use this track which we are proposing to build across the Rose property for as much territory adjacent to the Bay and adjacent to the Rose property as we could reasonably do rather than cross the proposed Bay Shore Highway at another point*" (R. 117) (emphasis ours).

He further said that he could not say that the desire to avoid crossing the Bay Shore Highway at another place would lead them to use the proposed trackage to get to San Mateo Point, but that it might (R. 117). He further said:

> *"As to the property which lies south of the east and west line which runs say through the easterly terminus of this line projected through the Rose property, I believe we would also turn that line to the south if industries offered immediately to the south, and would have those industries served over this track. * * * The track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island. * * * As the industries develop to the south we would, in time, expect to serve them over this extension or spur that runs over the Rose property, if it were the most convenient and economical way of doing it. One of the factors which we would take into consideration in determining whether we would use this track would be a consideration of whether we had to cross the Bay Shore Highway too frequently. This would be an important factor. By saying what would be economical there to do and what would not be, I am referring to whether it would be cheaper really to serve the industries which might locate out in that territory along the bay over this Rose tract track or over some other track. If it became necessary to cross highways and there had to be a separation of grades that would become an extensive (expensive) thing. The cost of crossing the highway would tend to, other things being equal, extend the limits of this track northerly and southerly. * * * In order to find out just*

what traffic we are going to have move over the Rose property on this track that we are talking about, we will have to wait until we see what industrial development there is out beyond it. When that industrial development occurs then we will meet it with whatever trackage is necessary in the most convenient and economical way" (R. 118-119).

He further said:

"We do not look for any industrial development outside of the Emma Rose property for a long time to come. If there is industrial development, however, on other properties, we would expect to serve the adjacent properties industrially over this track if that proved to be a convenient and economical way of doing so" (R. 123).

The assistant to the freight traffic manager of respondent, referring to the possibility of deep water terminals in this territory said:

*"If the construction of a deep water terminal should take place, my company would expect to serve such terminal or industrial development in whatever manner happened to be the most economical and efficient way of doing it, and if the closest piece of track to serve such development was the Emma Rose track, then that track might be used. * * * Whatever appeared to be the most desirable economic (economical) and proper thing to do would probably be done"* (R. 258) (all emphasis ours).

The president of respondent in a formal written statement to the press, referring to the proposed so-called "industrial trackage" said: "This track, by

extension, also made available properties beyond" (R. 203).

There was no expression whatever from any Southern Pacific officer or any other person that tended to indicate that it was not the intention of respondent to use the Rose trackage in any way that might be found desirable for the service of industries anywhere within the limits of the territory involved in this action, as such territory was found to be by the Special Master (Finding 7, R. 38, 39). There was no pretense that the authority for expenditure under which this construction was being had foreclosed such use, or precluded the construction of any extension thereof under future authorities for expenditure as may be deemed desirable. It was sufficiently admitted that turns of this Rose track to the north and/or to the south would be made if this was found to be the desirable way in which to serve this general territory.

The testimony of responsible officers of respondent hereinbefore referred to is important as showing that the proposed trackage is designed to serve the general territory here involved in so far as it may be found desirable to so do. The desirability of such use is amply shown by the situation on the ground, including the presence of the Bay Shore Highway which can be crossed by a railroad only by an expensive separation of grades, at an expense for each crossing of one-half of from $75,000 to $115,000. That the proposed construction would necessarily be used by respondent in serving all the territory proposed to be served by petitioner would seem obvious even without

any express admission by respondent's officers as to its probable use.

According to Findings 10 and 12 (R. 40, 41), findings not excepted to, respondent, with an attempt to avoid publicity, commenced its construction on *Saturday,* March 23, 1929, *about noon,* and hastily proceeded therewith on that afternoon and the following Sunday so that by Monday morning it had laid a track across the Bay Shore Highway and to and across petitioner's proposed location, altogether some 1442 feet, unballasted, and, except at the Bay Shore Highway location, with the ties not spaced to any apparent standard, a "rush job" with an obvious design to go as far as possible before an injunction could be obtained. At this point the temporary restraining order in this case served to stop the work. Respondent's answer admits (R. 24) that such trackage consists only of rails and ties laid upon the natural surface of the ground without grading or ballast and without being attached to the ground, and *avers* that, unless restrained, it will complete the same.

Efforts were made by officers and employees of respondent to explain the haste and secrecy attendant on this construction attempt, upon a theory other than that it was an effort to actually plant respondent in this new territory in advance of petitioner and without Interstate Commerce Commission authorization.

It is not disputed that the construction of said trackage was undertaken without there first having been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity therefor, and that no application for such a certificate has

ever been filed. Respondent's position with regard to this is alleged in its answer (R. 22, 23) as follows:

> "* * * in this behalf defendant avers that it proposes to construct a spur or industrial track which will be used exclusively for switching carload freight to and from such industries as may hereafter locate along said industrial or spur-track and have carload freights for switching and that said track will be operated within the yard limits and as a part of said station of San Mateo and exclusively as an industrial or spur-track of such station and in accordance with defendant's established policy of developing lands suitable for industrial sites and locations adjacent, contiguous and tributary to and in the immediate vicinity of defendant's said line of railroad requiring railroad services."

The right of way obtained by respondent for the proposed line was for the whole length from 40 to 50 feet in width, a width greater by many feet than the usual width for industrial spurs (Finding 11, R. 40). It was to be fenced on both sides with a good and substantial fence and was to be constructed with second-hand 90 pound rail (R. 166). The trackage to be constructed would not be used for loading and unloading cars and the industries to be served would take their service from spur tracks (R. 111) constructed by them connecting with respondent's trackage.

2. The Service to be Performed by Means of this Unauthorized Southern Pacific Trackage is Precisely the Service that Was to be Performed by the Santa Fe With its Trackage Involved in the Texas & Pacific Case, Supra.

The proposed trackage was styled by respondent's witnesses as a switch industry track as distinguished from an extension, and the particularization of the service to be rendered thereon upon which respondent has consistently relied as rendering it such was stated in its exceptions to the Master's findings as follows:

> "* * * that said track will be used exclusively for switching purposes, no less than carload business will be handled, no passenger trains will be operated over said track, no trains or engines will be operated over said track on time-cards or schedules, the billing of freight to and from industries served by said track will be performed at the present station of San Mateo, there will be no agent located at any point on said track, there will be no telegraph lines operated in connection with said track, there will be no freight sheds nor any station buildings at all located upon or adjacent to said track, operations upon said track will be conducted in the same manner as is usual and customary in switching carload freight to and from industries at other points on defendant's lines, all switching will be performed at night, there will be no storage track for the storage of cars in connection with said track, said track will be a part of defendant's San Mateo Station trackage facilities, rates published in defendant's freight tariffs to and from said San Mateo Station will apply to industries served by said track, no less than carload rates will apply to or from industries served by said track but said less than carload rates will only apply to and

from said San Mateo Station, there will not be any additional switching charge assessed for moving shipments from or to San Mateo Station and from and to industries served by said track, all shipments moving to and from industries served by said track will be billed by defendant's agent at San Mateo as originating at said station and there will be no express or mail service performed upon said track" (R. 53, 54.)

There was no pretense that the service to be given this territory, in the way and to the extent above stated, would not give to the industries that subsequently locate therein all railroad carrier service consonant with their needs, or that, in so far as the industries were concerned, the service would not be precisely the same in substance as if they were located on one of respondent's existing main lines of railroad.

3. Effect to be Given to Special Master's Findings and Conclusions, Approved and Affirmed by District Court.

The Special Master, to whom this case was referred by the District Court by consent of the parties, "to take the testimony and *report the findings of fact and conclusions of law* to the Court * * *, subject to exceptions according to the usual course of chancery practice" (R. 31, 32) (emphasis ours), after a full hearing, which included the taking of much oral testimony and also a personal inspection of the premises (R. 287), found and concluded that the proposed construction by respondent would constitute an extension of its line of railroad in violation of said Paragraph (18), as distinguished from a spur (Paragraph (22)), and so reported (R. 45). This conclu-

sion was affirmed and approved by the District Court (R. 58).

In the case of *Davis v. Schwartz,* 39 L. ed. 289, 155 U. S. 629, this Court, discussing the question of the effect to be given to a Special Master's findings, said (39 L. ed. at page 293):

> "As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable" (citing numerous decisions).

The case of *Kimberly v. Arms,* 129 U. S. 512, 32 L. ed. 764, was referred to in the opinion in *Davis v. Schwartz* as one in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and *his findings when the case is referred to him by consent of the parties, to report his findings of fact and conclusions of law,* as was done in this case, and the Court quoted from the opinion in that case as follows:

> "Its findings, like those of an independent tribunal, are to be taken as presumptively correct,

subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

The Circuit Court of Appeals of the Ninth Circuit in *McCarthy v. Bunker Hill, etc.*, 164 Fed. 927, 940, said, in speaking of the rule of non-interference with the findings of the trial Court in cases in which the evidence is substantially conflicting, that this rule is especially applicable "where the trial judge, at the request of the respective parties, has had the benefit of a personal inspection of the premises"; and also, in *Ladd & Tilton Bank v. Boyle*, 299 Fed. 56 at page 57, in discussing the findings of the Special Master to whom the case had been referred, said that it was satisfied with the findings and report of the Special Master "especially in view of the well established law that under such circumstances the conclusions of the master have every reasonable presumption in their favor and are not to be set aside or modified *unless there clearly appears to have been error or mistake on his part*", citing cases, including *Kimberly v. Arms, supra* (emphasis ours).

It is to be noted again that there was much oral testimony in this matter given by respondent's officers, and the case was peculiarly one in which, to use the language of the Circuit Court of Appeals in *Presidio Mining Co. v. Overton, et al.*, 270 Fed. 388, the finding of a judge who

"has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge

of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, * * * is *persuasive and presumptively correct"* (emphasis ours).

The considerations we have referred to and the authorities we have cited lead to the conclusion that this Court will regard the findings and conclusions of the Special Master, approved by the trial Court after argument before it, as presumptively correct and will not interfere therewith, unless it very clearly appears that there has been error or mistake on his part.

4. Rule to be Applied in Determining Whether Proposed Construction is an Extension as Distinguished From a Spur or Industrial Track Within the Meaning of Paragraphs (18) to (22).

It seems advisable here to discuss briefly another rule believed to be applicable in determining in an action of this character the question whether the proposed construction would be of the character of the trackage specified in Paragraph (22), such as a spur, etc., which is excepted by such paragraph from the effect of Paragraphs (18) and (20). The language of Paragraph (22) in this respect is that "The authority of the Commission conferred by Paragraphs (18) to (21) both inclusive, *shall not extend"* to *such* tracks (emphasis ours). Respondent's principal claim in this respect is that the proposed construction would be a spur or industrial track within the meaning of Paragraph (22).

In *Lancaster v. Gulf, Colorado & Santa Fe Ry. Co.*, 298 Fed. 488, 490 to 492 (the *Texas & Pacific* case in

the District Court of the Southern District of Texas), Judge Hutcheson said that the terms "extension" and "industrial track" have no clear and established statutory restrictive definition, but, on the contrary, have a wide latitude of meaning "according to the context in which they are used", and that since Congress had not undertaken to define the words and it was plain that they *may* be, according to the angle of approach, given wide and varied meaning, the purpose of the Act must be drawn from its entire structure, "and that purpose, together with the context in which the words are used, must at the last be the guide to the interpretation of the words at issue".

This view of Judge Hutcheson was expressly approved by this Court in the *Texas & Pacific* case, *supra*. This Court said (70 L. ed. at pp. 583, 584):

> "In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites *instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes.* It points also to *uses made of these terms* in other connections by courts, (the note specifying particularly, among other cases, the *Los Angeles Switching* case, 234 U. S. 294, affirming 18 I. C. C. Rep. 310, 312, 313, relied on principally by respondent in the proceedings below) *by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in Paragraphs (18) to (22) is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920"* (emphasis ours).

This Court, after stating this policy, said:

"When the clauses in Paragraphs (18) to (22) are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. * * * If the purpose and effect of the new trackage is to *extend substantially the line of a carrier into new territory,* the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph (18), *although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.* Being an extension, it cannot be built unless the Federal commission issues its certificate that public necessity and convenience require its construction. The Hale-Cement line is clearly an extension within this rule" (all emphasis ours).

5. The Proposed Extension of Respondent Was Into New Territory, Not Theretofore Served by it.

It would appear unnecessary, in view of the record, to do more than to discuss this question very briefly.

It is unquestioned that the whole of the territory here involved is, in so far as direct railroad service is concerned, virgin territory, never served by any railroad, and without anything therein immediately requiring such service. When this Court said in the *Texas & Pacific* case, *supra,* "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into *new territory,* the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph (18)", and *"into territory not theretofore served by the carrier",*

(70 L. ed. at p. 584) (emphasis ours) it is submitted that the Court necessarily meant territory not theretofore *actually and directly* served by a carrier by its existing railroad. There could have been no thought of anything in the nature of *constructive* service by reason solely of the location of the existing railroad being such as to enable it by a short extension to easily reach other territory and thereby serve the same. Such a thought would be repugnant to the whole purpose of Congress in enacting this legislation which was to prevent railroad extensions not found by a neutral expert tribunal to be required by public convenience and necessity, in view of the conclusion of Congress that this policy was essential to the development and maintenance of an adequate railway system for the people of the United States. Congress recognized, as was said by this Court in the *Texas & Pacific* case,

> "that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss" (70 L. ed. at p. 584).

When the matter is considered in the light of the principles and policy declared in the *Texas & Pacific* case, it would seem plain that the mere fact that the

territory proposed to be served by the new trackage is situate within the corporate limits of a city or town already traversed by the railroad to be extended is wholly immaterial in determining whether the new construction would be an "extension" within the meaning of these statutory provisions. It might be contended with as much reason that the territory presently served comprised the *whole state* in which the company has an existing line. It is a matter of common knowledge that the most expensive construction and the fiercest competition are to be found in our larger cities, and the supervisory power as to extensions is more necessary there than elsewhere. No authority is cited in support of the suggestion that the prescribed corporate limits of a city or town play any part whatever in the determination of the territory served by a carrier, in the sense here involved, and such a suggestion is opposed to the whole spirit and purpose of the sections of the Transportation Act of 1920 here involved.

An illustration of this situation is to be found in *Missouri Pac. R. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 41 F. (2d) 188, in which the Circuit Court of Appeals of the Eighth Circuit in effect ruled that in a single city there may be territory within 3700 feet of its rails, adaptable to industrial purposes, reasonably accessible to each of two railroad carriers serving the city, *which is not in fact occupied or served by either*, and that in such event neither can occupy and serve such territory without authorization under said Paragraphs (18) to (21). Certiorari was denied by this Court in that case, on October 20, 1930.

So also must the fact that the Emma Rose tract, which extends miles to the Bay of San Francisco, abuts on its westerly end respondent's right of way through the City of San Mateo, be held to be *of no importance whatever* in determining what *territory* is now served by respondent within the meaning of the *Texas & Pacific* decision. *Ownership by a single interest* of a vast territory means nothing in this connection. As to the very small portion of this tract adjoining such right of way it might fairly be admitted that industries thereon could be served by means of a spur or industry track within the meaning of said Paragraph (22). In the *Texas & Pacific* case, *supra*, this Court, discussing the terms "spur, industrial, switching," etc., tracks, said (70 L. ed. at p. 584):

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, *who being within the same territory and similarly situated are entitled to like service from the carrier*" (emphasis ours).

It is to be borne in mind that this proposed track is not designed to give *"rail service"* to the *owners of the Emma Rose tract*. They want no railroad transportation service. The whole plan is, through making the Emma Rose property attractive to purchasers desiring locations for industrial sites by furnishing a railroad track thereover (thus enabling the owners to subdivide and sell to industries this area, *now unoccupied and undeveloped*), that this area *will*

become a new railroad traffic producing area or settlement served by respondent.

We respectfully submit that upon no reasonable theory can any of the territory here involved be held to be other than *new territory not heretofore served by respondent.*

6. The Proposed Trackage Would Constitute an Extension of its Line of Railroad by Respondent, Within the Meaning of Said Paragraphs (18) to (22) by the Test Laid Down in the Texas & Pacific Case.

It is impossible, we submit, to distinguish in any material respect, the *Texas & Pacific* case, *supra*, from this case. In view of the opinion in that case, concurred in by all the members of the Court except Mr. Justice McReynolds, who dissented upon a ground not pertinent to this particular question, and the fact that it has ever since been cited and followed continuously by the Courts without modification in any respect by any subsequent decision, we feel that it will be unnecessary here to do more than to show the striking similarity of the two cases in all material respects, and the consequent applicability to this case of the ruling in that case.

In that case, both the Texas & Pacific and the Santa Fe lines ran through the City of Dallas, Texas, and beyond, the Texas & Pacific in a general westerly direction and the Santa Fe in a general southwesterly direction. Located about 2½ miles westerly of Dallas and on the Texas & Pacific was the so-called "industrial district" served by the Texas & Pacific and which the Santa Fe also desired to reach, the latter's existing line being, at its station of Hale, some 3¼

miles air-line distance from such district. The traffic of this district moved in carload lots, and that destined via Santa Fe was interchanged by the Texas & Pacific at points on its line distant from 12 to 30 miles from the industries. The Santa Fe proposed to serve the industries in this district with its own rails by constructing trackage from its Hale Station thereto (*Texas & Pacific* case, *supra*, 70 L. ed. at pp. 582, 583). Of this situation and the claim that the proposed trackage would constitute a spur or industrial track as distinguished from an extension, this Court said (70 L. ed. at p. 583):

> "The Hale-Cement Line is clearly not a spur in the sense in which that word is commonly used. It *presents some of the characteristics of a branch; and a branch is clearly an extension of a railroad within the meaning of Paragraph 18. The Santa Fe contends that it constitutes an industrial track within the meaning of Paragraph 22, because the line is to be constructed solely for industrial purposes.* It shows that, according to the plans, *the general public is not to be served; that, except at Hale, there will be no public station for the receipt or delivery of freight; no telegraph service; no express, mail, or passenger traffic; that the transportation between Hale and the industries will be confined to carload freight; that it will be conducted as a switching service for which no charge will be made; and that the Hale rate will apply to all traffic on the projected line. It argues that a branch is a line serving one or more stations beyond the point of junction with the main line or another branch, and to or from which stations regular tariff rates are in effect; that an industrial track is a line con-*

structed to serve or reach industries over which regular scheduled passenger or freight train service is not performed and for transportation over which only a switching charge, if any, is made; and that neither the length of the line, nor the character of the construction, can convert into a branch a line of the nature described" (emphasis ours).

The Court followed this statement with the statements hereinbefore quoted at pages 42 and 43 of this brief.

It would seem that no distinction material here can be drawn between these cases, and that the facts asserted by respondent (see pp. 36, 37, 38, *supra*) upon which it bases its claim that the proposed trackage does not constitute an "extension" demonstrate lack of any material distinction.

In the light of the opinion in the *Texas & Pacific* case, *supra*, it is clear that the fact that in the *Texas & Pacific* case there were *existing industries which were then being served* by the Texas & Pacific is altogether immaterial in determining whether the new trackage would be an "extension" within the meaning of said Paragraphs (20) to (22). It was one of the purposes of this legislation to protect against any waste of the resources of any carrier by construction of unnecessary lines, and the approval of the Interstate Commerce Commission was therefore required as to *any* extension into territory not theretofore served by it, entirely regardless of whether such territory is served by any other carrier.

Much stress was laid by respondent in the Courts below upon the fact that the proposed trackage would

constitute what it called an "industrial development track", a track constructed into new territory in the general vicinity of territory already served by it, for the purpose of attracting industries to such new territory, which industries it will be enabled to serve directly by such trackage. Surely such trackage would constitute an extension of its line within the meaning of Paragraph (18) just as much as if it were to be constructed into territory already overflowing with industries, and was just as much within the contemplation of Congress in enacting this legislation as was the proposed Santa Fe line. If industries subsequently locate therein, respondent *will serve them and the territory in which they locate.* If industries do not locate therein, the construction expenditure *will have been wholly wasted,* one of the very things specified by this Court as recognized by Congress as being of national concern in the matter of maintaining for the people of the United States an adequate railway system. The approval of some neutral official body in such a case, involving as it does this element of speculation on the part of the carrier in making its investment (which may be very substantial in amount), is just as necessary as in the case of any other proposed construction, in order to preclude such construction as is not reasonably necessary in the interest of public convenience and necessity.

It should be here noted that, as to the Emma Rose tract, to which respondent asserts it proposes to confine its construction, the facts claimed by us to show an extension as to which a certificate of public con-

venience and necessity is requisite, are fully admitted and expressly avowed by respondent.

It has been earnestly claimed by respondent that it has been its practice and the practice of other interstate carriers, ever since 1920, to construct such industrial development trackage without obtaining the approval of the Interstate Commerce Commission. It introduced certain evidence to that effect as to itself, and some as to petitioner and the Santa Fe. Many of the illustrations were of construction prior to the year 1926, in which year the *Texas & Pacific* case, *supra,* was decided by this Court, when, for the first time, the meaning of the term "extension" in Paragraph (18) was definitely and authoritatively determined. That there was a difference of opinion in this regard prior to this decision was well illustrated by the *Texas & Pacific* case itself, in which the decision of the District Court was in accord with that of this Court, while that of the Circuit Court of Appeals was directly opposed thereto. We believe it cannot be successfully disputed that, ever since this Court's decision, interstate railroad carriers have more substantially complied with the requirement of the statute as that requirement was defined by this Court in that case. However this may be, it is perfectly clear that prior construction of unauthorized trackage without the necessary authorization cannot change the law or afford any defense in the matter here involved. That the law may have been violated in the past by respondent and one or two other carriers, can constitute no defense to a charge of subsequent violation. There was no attempt to show such a gen-

eral practice throughout the country, or any acquiescence therein as proper by the Commission or other governmental authorities, and the evidence introduced affords no basis for a construction so manifestly opposed to the plain language of the statute as well as to the whole spirit and purpose thereof.

We respectfully submit that there is no escape from the conclusion that the proposed trackage of respondent would constitute an extension of its line of railroad within the meaning of said Paragraphs (18) to (22) and the opinion of this Court in the *Texas & Pacific* case, *supra*. In the instant case respondent is in reality attempting to obtain a modification of the views expressed in the *Texas & Pacific* opinion which would have the effect of rendering said Paragraphs (18) to (21) ineffective to accomplish the purpose of their enactment. Surely such would have been the situation if this Court in the *Texas & Pacific* case had accepted the narrow and technical construction of the term "extension" contended for by the respondent in that case and by the respondent here. But this Court, keeping constantly before it as its guiding star the obvious purpose of Congress in enacting this legislation, gave to the language used a perfectly justified meaning and the only meaning wholly consistent with that purpose.

To require, as a condition precedent to such construction as is here proposed by respondent, a certificate of public convenience and necessity from the Interstate Commerce Commission, imposes on a carrier no disadvantage or burden as to construction reasonably required in the public interest. If respond-

ent's plan is in full consonance with the purposes to be accomplished by said Paragraphs (18) to (21), there is no reason to doubt that the Commission will grant its application for a certificate. If not in consonance with those purposes, authorization will be denied, as, of course, it should be. This question is, under the law, one for the Commission, not the respondent here, to determine.

SUMMARY OF PETITIONER'S CONTENTION.

We respectfully submit that:

1. Petitioner is, and was at the time of the institution of this suit, and thenceforth to the entry of final decree, a *"party in interest"* within the meaning of that term in said Paragraph (20), with relation to the proposed construction of respondent, because, by virtue of its pending application for authority to construct through the same territory, it had an ever present interest in maintaining the *status quo* in that territory with relation to railroad construction therein, as against any unauthorized and unlawful construction by another carrier; and, as such party in interest, was entitled to institute and maintain this suit by virtue of the statutory authority to so do conferred by said Paragraph (20).

2. Respondent's proposed construction, both as to the Emma Rose tract and all the remainder of the territory involved, is into "new territory not theretofore served by it", and would constitute an "extension" of its line of railroad within the meaning of said Paragraphs (18) to (22). Respondent has not

procured nor attempted to procure from the Interstate Commerce Commission the certificate of public convenience and necessity required by said paragraphs as a condition precedent to such construction.

For these reasons we respectfully ask that the judgment of the Circuit Court of Appeals of the Ninth Circuit herein be reversed and that the judgment of the District Court for the Northern District of California be affirmed.

Dated, San Francisco, California,
September 12, 1931.

F. M. ANGELLOTTI,
H. P. TYLER,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

Statutory provisions involved:

Paragraphs (18), (19), (20), and (22) of Section 1 of the Interstate Commerce Act (U. S. Code, Ann., Title 49, Section 1, Paragraphs (18), (19), (20), and (22)), contained in the Transportation Act of 1920, are as follows:

> Paragraph (18). After ninety days after this paragraph takes effect *no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof,* or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction of operation, or construction and operation, of such additional or extended line of railroad,* and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment (emphasis ours).
>
> Paragraph (19). The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and

other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Paragraph (20). The commission shall have power to issue such certificate as prayed for or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. *From and after issuance of such certificate, and not before, the carrier by railroad may,* without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and *proceed with the construction, operation, or*

abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of Paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of Paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both (emphasis ours).

Paragraph (22). The authority of the Commission conferred by Paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 240, Sub. (a), of the Judicial Code, (U. S. Code, Ann., Title 28, Section 347, Sub. (a)), is as follows:

Section 347. Certiorari to circuit courts of appeals and Court of Appeals of District of

Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation), *Petitioner*,

vs.

SOUTHERN PACIFIC COMPANY (a corporation), *Respondent*.

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 896.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation), *Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY (a corporation), *Respondent.*

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The sole question involved is whether petitioner was a "party in interest" within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act and thereby entitled to maintain a suit in the United States District Court to enjoin respondent from constructing a track 8200 feet in

length leading from its main line in the City of San Mateo, State of California, across a tract of land immediately adjacent to its right of way, for the purpose of switching carload freight from and to industries which contemplated locating thereon.

At the time petitioner instituted the suit in the United States District Court it only had a charter, and had made an application to the Interstate Commerce Commission for a certificate of public convenience and necessity, but possessed no right of way, it was without any railroad, without any traffic to protect, and the record fails to disclose that the construction and operation of respondent's proposed track would injure petitioner or cause it to suffer any damage.

It is stated at page 5 of the petition for writ of certiorari that "It can not be questioned that the decision of the Circuit Court of Appeals holds that, * * * the construction proposed by respondent would constitute * * * an extension of its line of railroad within the meaning of said Paragraghs (18) and (20) * * *," nevertheless on the preceding page 4, petitioner states "The Circuit Court of Appeals declined to decide the question 'whether the line contemplated by the applicant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the State Commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission' (Opinion, R. 318–322)."

While other important questions were involved the Circuit Court of Appeals for the Ninth Circuit reversed the judgment entered by the District Court of the United States for the Northern District of California, Southern Division, upon the sole ground that

petitioner was not a "party in interest" within the meaning of paragraph (20) of Section 1 of the Act.

The Circuit Court of Appeals stated that it was deemed "unnecessary, if not improper, to consider the doubtful and perplexing question whether the line contemplated by the appellant (respondent) is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission."

The Circuit Court of Appeals predicated its decision upon the fact, which was not controverted, that petitioner had "been organized as a corporation," had "projected a line of railroad" and had "applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant (respondent) from building a spur track, or extending its line, as the case may be."

The Circuit Court of Appeals held that "such showing will not, in our opinion, support or justify an injunction such as was granted here." (46 Fed. Rep. (2d) 729, 730-31).

It is therefore deemed unnecessary to answer the argument interwoven in petitioner's brief with respect to the other questions which were presented to the Circuit Court of Appeals.